

Article - Estates and Trusts

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§14.5–814.

(a) None of the following powers conferred on a trustee by the governing instrument may be exercised by that trustee:

(1) The power to make discretionary distributions of either principal or income to, or for the benefit of, the trustee in the individual capacity of the trustee, unless limited by an ascertainable standard relating to the health, education, support, or maintenance of the trustee, as defined in 26 U.S.C. §§ 2041 and 2514 and the U.S. Treasury regulations issued under those sections;

(2) The power to make discretionary distributions of either principal or income to satisfy a legal obligation of the trustee in the individual capacity of the trustee for support or other purposes;

(3) The power to make discretionary allocations in favor of the trustee of receipts or expenses as between income and principal;

(4) A power, in whatever capacity held, to remove or replace a trustee that holds a power proscribed in this subsection; or

(5) The power to exercise a power proscribed in this subsection with regard to a beneficiary other than the trustee to the extent that the beneficiary could exercise a similar prohibited power in connection with a trust which benefits the trustee.

(b) If a trustee is prohibited by subsection (a)(1) of this section from exercising a power conferred on the trustee, the trustee may nevertheless exercise the power except that the exercise of that power by the trustee shall be limited by an ascertainable standard relating to the health, education, support, or maintenance of the trustee, as defined in 26 U.S.C. §§ 2041 and 2514 and the U.S. Treasury regulations issued under those sections.

(c) If the governing instrument contains a power described under subsection (a) of this section, and there is no trustee that can exercise the power, on application of a party in interest, a court may appoint a trustee that is not otherwise disqualified under this section to exercise the power during the period of time that the court designates.

(d) This section does not apply if:

(1) As a result of the application of subsection (a) of this section, a marital deduction for the trust property would not be allowed to a spouse who is a trustee and to whom a marital deduction would otherwise be allowed under the Internal Revenue Code;

(2) The trust is revocable or amendable, during the time that the trust remains revocable or amendable; or

(3) Contributions to the trust qualify for the annual exclusion under § 2503(c) of the Internal Revenue Code of 1986, as amended, as in effect on the effective date of this title, or as later amended.

(e) (1) In this subsection, “parties in interest” means:

(i) Each trustee of the trust then serving; and

(ii) Each income beneficiary and remainder beneficiary of the trust then in existence or, if the beneficiary has not attained majority or is otherwise incapacitated, the legal representative of the beneficiary under applicable law or the donee of the beneficiary under a durable power of attorney that is sufficient to grant the authority.

(2) Except as provided in subsection (d) of this section, this section applies to:

(i) A trust created under a governing instrument executed after September 30, 1995, unless the terms of the governing instrument provide expressly that this section does not apply; and

(ii) A trust created under a governing instrument executed before October 1, 1995, unless all parties in interest elect affirmatively not to be subject to the application of this section on or before the later of October 1, 1998, and 3 years after the date on which the trust becomes irrevocable.

(f) The affirmative election required under subsection (e) of this section shall be made through a written declaration signed by the interested person and delivered to the trustee.

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